Workplace Safety and Insurance Appeals Tribunal

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Tribunal d'appel de la sécurité professionnelle et de l'assurance contre les accidents du travail

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Ontario

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Quarterly Production and Activity Report

April 1 to June 30, 2010

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Production Summary

- At the end of the second quarter 2010, the active inventory totalled 3,871. This represents the seventh consecutive quarter where the level has remained relatively stable. During this period, the inventory has fluctuated very little (+/- 5%) as compared with its current level.

- Incoming appeals numbered 1029, of these 909 were appeals from WSIB decisions and 120 appellants advised they were ready to proceed to hearing following a period of inactive status.

    - This compares to 865 new appeals and 173 reactivated appeals recorded in the first quarter of 2010.
    - In the 2nd quarter of 2009 the Tribunal recorded 843 new appeals and 149 re-activations.
    - In 2009, the weekly average of hearing ready appellants was 59. For Q2 2010, the weekly average of hearing ready appellants is 55. This figure excludes cases reactivated from inactive status.

- Dispositions numbered 943. This includes 319 dispositions in the pre-hearing areas resulting from dispute resolution (ADR) efforts and 624 after hearing dispositions; of the after hearing dispositions, 605 followed from Tribunal decisions.

- At the end of Q2-10, the inactive inventory was 3,274 cases (at the end of Q1-10, the inactive inventory was 3,320 cases).

- In Q2-10, 87% of final decisions were released within 120 days. In 2009, 85% of final decisions were released within 120 days.

The Tribunal's Notice of Appeal (NOA) process places responsibility in the hands of the parties and representatives to advance a case, and requires appellants to confirm their readiness to proceed (by filing a Confirmation of Appeal) with their appeals within two years of completing the NOA.

The NOA inventory includes cases that would previously have been closed as inactive by Tribunal intervention. These "dormant" cases are tracked as part of the Tribunal's case management. Many are expected to close as abandoned appeals after a two-year period expires. At the end of the second quarter of 2010, the notice inventory included 1,267 dormant cases, the active inventory totalled 3,871 cases, and the inactive inventory totalled 3,274 cases.

Production Charts

A. Active Inventory

Period	Active Inventory
Q4-2007	4650
Q1-2008	4532
Q2-2008	4227
Q3-2008	4047
Q4-2008	4008
Q1-2009	3915
Q2-2009	3843
Q3-2009	3910
Q4-2009	3832
Q1-2010	3867
Q2-2010	3871

B. Incoming Appeals

Period	Incoming Appeals
Q4-2007	978
Q1-2008	930
Q2-2008	920
Q3-2008	832
Q4-2008	969
Q1-2009	1002
Q2-2009	992
Q3-2009	957
Q4-2009	945
Q1-2010	1038
Q2-2010	1029

C. Dispositions

Period	Dispositions – total	Pre-hearing	After Hearing
Q4-2007	1219	427	792
Q1-2008	1173	386	787
Q2-2008	1213	375	838
Q3-2008	1025	299	726
Q4-2008	1028	267	761
Q1-2009	1056	347	709
Q2-2009	997	341	656
Q3-2009	970	337	633
Q4-2009	1060	367	693
Q1-2010	1019	328	691
Q2-2010	943	319	624

D. Inactive Inventory

Period	Inactive Inventory
Q4-2007	4068
Q1-2008	4068
Q2-2008	4086
Q3-2008	4060
Q4-2008	3817
Q1-2009	3696
Q2-2009	3593
Q3-2009	3480
Q4-2009	3389
Q1-2010	3320
Q2-2010	3274

E. Notice of Appeal (Dormant cases)

Period	Total Dormant	Change from previous quarter
Q4-2007	1358	64
Q1-2008	1233	-125
Q2-2008	1245	12
Q3-2008	1232	-13
Q4-2008	1212	-20
Q1-2009	1251	39
Q2-2009	1318	67
Q3-2009	1238	-80
Q4-2009	1201	-37
Q1-2010	1185	-16
Q2-2010	1267	82

Judicial Review Activity

Second Quarter 2010

Over the past twenty-five years the Tribunal has achieved a remarkable record on judicial review. The courts have consistently upheld the decisions of the Tribunal. In this quarter alone the Tribunal was successful in having three applications for judicial review dismissed following a hearing (there were also three in the first quarter of 2010), as well as having an application for leave to appeal to the Court of Appeal dismissed.

However, with the decision of the Supreme Court of Canada in Decision 390/08 to dismiss the Tribunal's application for leave to appeal, this quarter marks the first time in the Tribunal's history that a Tribunal decision was overturned by the courts on judicial review.

The status of applications for judicial review involving the Tribunal for the second quarter of 2010 is set out below. Only those judicial reviews where there was some significant activity during the quarter are listed. Most applications for judicial review are handled by General Counsel and the lawyers in the Tribunal Counsel Office.

1. Decisions Nos.390/08 (February 22, 2008) and 390/08R (July 17, 2008)

The worker made a claim for an injury to his hand, arm and back after he had been terminated by his employer. The Board allowed benefits for two months in 2004, closing benefits on August 5, 2004. The worker appealed to the Tribunal for further benefits. The employer cross appealed, alleging no entitlement should have been granted at all. The Vice-Chair denied both the worker's appeal and the employer's cross appeal.

The worker commenced an application for judicial review. He alleged that there were breaches of natural justice during the hearing in the questioning of witnesses. The worker also contested the conclusions reached by the Tribunal on medical evidence and the assessment of competing facts. The judicial review was heard on September 24, 2009. The Divisional Court Panel of Jennings, Wilson and Corbett released its decision on October 27, quashing the Tribunal's decision.

Although rejecting the worker's objections about procedural fairness, the Court held the Tribunal's decision to terminate benefits on August 5 was unreasonable. The Court disagreed with the Tribunal's factual determination that the worker's ongoing problems were not medically substantiated. The Court further opined that if the Tribunal was not satisfied with the evidence it could require the worker to undergo an examination by a medical health professional, which would apparently be able to shed light on the medical state of the worker at a particular point in time five years earlier. The Court directed that the matter should be referred to a differently constituted Tribunal panel to determine the date when the worker no longer had a work-related injury.

The Tribunal filed an application for leave to appeal to the Court of Appeal, on the grounds that in wading into the facts on a matter squarely within the Tribunal's exclusive jurisdiction the Divisional Court failed to apply the reasonableness standard of review. On February 3, 2010 the Court of Appeal Panel of Laskin, Lang and Doherty dismissed the Tribunal's motion for leave to appeal.

As this decision posed some potentially significant issues for the Tribunal, including the degree of deference to be granted to Tribunal factual determinations following the Supreme Court of Canada's decision in *Dunsmuir v. New Brunswick*, [2008] SCC 9, the Tribunal sought leave to appeal to the Supreme Court of Canada. On June 3, 2010 the

Supreme Court dismissed the application for leave to appeal, per LeBel, Deschamps and Charron JJ, without written reasons.

The Tribunal is taking steps to reconvene the hearing in accordance with the decision of the Divisional Court.

2. Decisions Nos.2835/07 (December 17, 2007) and 2835/07R (May 26, 2008)

The worker fell at work and injured his wrist. He was paid benefits for almost a year. The worker's appeal for ongoing entitlement for organic and psychological disability was denied by the Tribunal. He filed an application for judicial review challenging the Tribunal's finding that he was not entitled to benefits for a psychological disability.

In reaching its decision the Tribunal applied the Board policy on Psychotraumatic Disability. After assessing the evidence the Tribunal found the worker failed to establish on the balance of probabilities that the injury was a significant factor in the development of the disability. There was no medical diagnosis that the worker suffered from post-traumatic stress disorder. Although the worker did suffer from depression, the Tribunal found this was caused by a number of non-work-related factors.

The judicial review was scheduled to be heard in Toronto on February 25, 2010 but was adjourned by the worker's counsel on the day of the hearing. It was rescheduled, and heard on April 22 before the Divisional Court Panel of Justices Swinton, Sachs and Wilton-Siegel. The Court dismissed the judicial review.

Justice Sachs, who read the unanimous reasons of the Court, stated that there was ample evidence to support the conclusions of the Tribunal.

The worker had raised a number of allegations that the Tribunal had breached the principles of natural justice. One of them was that the Tribunal had admitted hearsay evidence. In one passage that will be helpful for future judicial review applications, the Court stated:

> "The strict rules of evidence do not apply to the Tribunal. The Tribunal may admit hearsay evidence. There was no requirement that the author of the letter be sworn as a witness before the letter could be made use of by the Tribunal. The *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c.16 contemplates the use of the Board's file on an appeal - a file that is inevitably replete with hearsay."

The Court's conclusion also adopted the Tribunal's significant contribution analysis, noting"

> "There was ample evidence before the Tribunal to support its conclusion that while the accident may have been a factor that contributed to the Applicant's depression, it did not make a significant contribution, and that other non work-related factors outweighed the contribution of the work-related injury to such an extent that this injury could not be seen as a factor that made a significant contribution to the development of the Applicant's depression."

3. Decisions Nos.1791/07 (August 28, 2007), 1791/07R (March 3, 2008) and 1791/07R2 (September 21, 2009)

The worker, a kitchen helper, injured his neck in November 2004. He was granted LOE benefits from May 9, 2005 until the end of 2010. Entitlement was extended to include

his low back, shoulders, and chronic pain disability. The worker was also granted a 45% NEL award for chronic pain.

The worker appealed the denial of entitlement for carpal tunnel syndrome, entitlement for a psycho-traumatic disability, and the amount of a NEL for chronic pain. The Tribunal held the worker had no entitlement for carpal tunnel syndrome, he was not entitled to a psycho-traumatic award, and he was not entitled to an increase in his NEL.

The worker commenced an application for judicial review. The Tribunal served and filed its Record, and was in the process of preparing its factum when it was noted that the worker's counsel had referred to evidence in his factum that was not before the Tribunal. After discussions with the worker's counsel, it was agreed that this judicial review would be put on hold while the worker pursued a further reconsideration.

The further reconsideration was denied by Decision 1791/07R2 (September 21, 2009).

The worker revived his application for judicial review. The application was heard in June 2010 by a Divisional Court panel comprised of Justices Herold, Jennings and Lederman. At the outset of the hearing, the applicant abandoned the application in respect of the psychotraumatic disability award. The Court unanimously dismissed the application in respect of entitlement to benefits for carpal tunnel syndrome. The Court stated:

> "The Tribunal also made findings of credibility with respect to the evidence before it and made decisions with respect to the weight to be attributed to the medical opinions it considered, as it was not only entitled to but also required to do. It cannot be said that the Tribunal's decision to deny a benefit for carpal tunnel syndrome was unreasonable in light of the ample evidence before it to support this conclusion."

4. Decisions Nos.1971/00 (January 24, 2001), 1971/00R (December 11, 2001), 1971/00R2 (April 24 2007), and Decisions Nos.1357/03I (September 26, 2003), 1357/03 (November 19, 2004), and 1357/03R (April 20, 2007)

In this application for judicial review, involving six decisions for the same worker, the worker was denied entitlement for his neck, right shoulder and carpal tunnel syndrome. The worker first appealed for entitlement based on two specific incidents allegedly occurring at work in 1994. The appeal was denied by Vice-Chair Loewen in Decision 1971/00. An application for reconsideration was also denied by Vice-Chair Loewen in Decision 1971/00R.

The Applicant, represented by new counsel, brought a new appeal for entitlement based on disablement. This appeal was heard by Vice-Chair Carroll. After obtaining the opinion of an Assessor, Vice-Chair Carroll denied this appeal in Decision 1357/03.

The Applicant then brought an application to reconsider Decisions 1971/00, 1971/00R and 1357/03. He alleged there had been a misinterpretation of the Assessor's report in Decision 1357/03, and that if there had been a whole person approach taken the Applicant's appeals would have been allowed.

In Decisions 1357/03R and 1971/00R2, Vice-Chair Moore denied the application for reconsideration. Vice-Chair Moore obtained a clarification from the Assessor, which confirmed that his report had not been misinterpreted by Vice-Chair Carroll. Vice-Chair Moore held there was no error in the Tribunal's decisions to attribute the worker's ongoing upper back/neck and right shoulder complaints to the progression of his degenerative condition of the cervical spine, and not to the workplace incidents or disablement.

Counsel for the Applicant commenced an application for judicial review of Decisions 1971/00, 1971/00R, 1971/00R2, 1357/03 and 1357/03R. The judicial review was heard in Ottawa on June 17. The Divisional Court panel of Swinton, Reilly and Heeney reserved its decision. The Court released its decision on June 18 dismissing the application for judicial review.

The Court held that it was not its function on judicial review to substitute its opinion when the standard of review is reasonableness. The Court held that there was ample evidence to support the Tribunal's findings on the disputed points, and although there was some ambiguity in the assessor's opinion it was clarified by Vice-Chair Moore. The Court stated:

> [9] Where the applicant's claim, for benefits failed was on the causation test. The Tribunal Vice-Chairs carefully weighed the evidence before them, each concluding that neither the 1994 incidents nor the general work duties made a significant contribution to the applicant's disability. They concluded that he had a deteriorating, underlying condition which became symptomatic when he worked. However, the work did not cause the underlying condition.
>
> [10] It was the task of the Tribunal to weigh the evidence and to determine whether entitlement was established. The Tribunal's conclusions were intelligible, and they fall within a range of acceptable outcomes given the evidence before it."

5. Decisions Nos.565/08 (June 11, 2008) and 565/08R (January 26, 2009)

The worker, a backhoe operator, was called in to repair a broken water main at night by his employer. After completing the repairs, the worker was injured in a motor vehicle accident when he fell asleep while driving home. The Board held the worker was not in the course of his employment. The worker appealed to the Tribunal.

The Vice-Chair reviewed Board policy and prior Tribunal decisions. The general rule is that a worker is not considered to be in the course of employment when driving home from work. However the Vice-Chair held the worker was responding to an emergency call and so would be considered to be a worker under Board policy at the time of his car accident.

The employer commenced an application for judicial review of the Tribunal's decision. Counsel for the employer alleged the Tribunal had no standing as a party in this judicial review application, and also that the Tribunal should have no right to appeal if the judicial review application were granted.

The judicial review was heard on December 14, 2009 before the Divisional Court panel of Lederman, Jennings and Swinton. The Court reserved, releasing its decision to dismiss the judicial review on December 21.

The Court held the Tribunal gave clear reasons why the Board policy applied in these circumstances, and that its conclusion was reasonable. Further, the Court rejected the worker's argument that the Tribunal should have found the Board policy was inconsistent with s.126(4) of the WSIA. This argument had not been made by the worker at the Tribunal hearing, and it was therefore not unreasonable for the Tribunal not to have dealt with it.

Since the judicial review application was dismissed, the Court did not have to decide whether the Tribunal would have had the right to appeal. However the Divisional Court

noted that it would have ruled that it did not have the jurisdiction to determine this, as it would have been for the Court of Appeal to determine if the Tribunal had standing to appeal to that Court.

On January 5, 2010 the employer filed a motion for leave to appeal to the Court of Appeal. The Tribunal and the worker filed responding factums. On April 13, 2010 the Court of Appeal (Lang, Gillese and Rouleau) dismissed the application for leave to appeal with costs.

6. Decisions Nos.397/05 (September 15, 2006) and 397/05R (February 20, 2007)

The worker injured his thumbs in 1999. He was granted LOE benefits until December 17, 2001 and a 25% NEL for the right thumb. He appealed to the Tribunal for LOE benefits after December 17, 2001, a NEL for his left thumb, and benefits for chronic pain or psychotraumatic disability. The worker also appealed for entitlement for benefits his shoulders, neck, low back, or dystonia, which he alleged arose out of the same injury.

The worker had a non-compensable injury in 1998. There were indications the worker had a pre-existing psychological problem which arose from the 1998 injury.

The Panel held that the worker had non-organic entitlement, but no organic entitlement for his various complaints. Consequently the Panel found the worker had entitlement for chronic pain, which included entitlement for the dystonia. The Panel also found the worker was entitled to full LOE benefits from December 17, 2001 and continuing to date. Further, the worker was found entitled to an LMR assessment.

The worker commenced an application for judicial review. Following discussion with the worker's representative, it was agreed that the judicial review would be adjourned while the Tribunal commenced a reconsideration on its own motion in conjunction with the worker commencing a reconsideration of another Tribunal decision.

Both reconsiderations were assigned to a new Tribunal Vice-Chair, who scheduled a pre-hearing conference call to discuss the issues. Following the pre-hearing conference call the worker withdrew his reconsideration and agreed to the judicial review being dismissed as abandoned on a without costs basis.

7. Decision No.985/05 (August 6, 2008)

In this French language appeal, the worker was a nurse's aide at a long-term care facility. The worker appealed a decision of the Appeals Resolution Officer denying entitlement for fibromyalgia.

The worker claimed entitlement on a disablement basis, alleging her condition resulted from hard work. The Vice-Chair noted that hard work is not a medical condition and that there is no presumption that hard work causes injury, unlike occupational diseases where exposure to certain elements or conditions is recognized as causing injury. There was no objective evidence that the worker developed her fibromyalgia as a result of her employment. The rheumatologist who first diagnosed the worker's fibromyalgia indicated that that condition was not caused by employment-related physical stress.

The worker, who is self-represented, faxed the Tribunal a notice of application for judicial review. Since an originating process must be served personally, the Tribunal advised the worker that the Tribunal would not accept service by fax. The worker took no further steps. In April the Ottawa Divisional Court sent a notice advising the worker that the

judicial review would be dismissed within 10 days unless the worker took steps to perfect it. The worker took no further steps to perfect the judicial review.

8. Decisions Nos.893/06 (October 12, 2006) and 893/06R (November 15, 2007)

The worker's short term earnings were calculated based on his earnings of $25.00 an hour, with no deductions, at the time of the injury. His average earnings were reduced after 13 weeks, at which point they were based on the worker's earnings over the prior 24 months as reported to the Canada Revenue Agency through his income tax returns. The worker appealed to the Tribunal, alleging that his earnings should continue to be based on $25.00 an hour.

The Vice-Chair denied the appeal. He found the worker to be a "non-permanent employee" within the meaning of Board policy, and it was appropriate to apply Board policy to recalculate the earnings after 13 weeks to reflect average earnings. The Vice-Chair held that the income tax records of the worker identified the true nature of the earnings of the worker. The same Vice-Chair denied the worker's application for reconsideration.

The worker retained counsel and commenced an application for judicial review. The Tribunal filed its Record of Proceedings. The worker then discharged his lawyer. The worker filed his factum and a certificate of perfection. The Tribunal filed its responding factum. It was originally scheduled to be heard in June, but due to a scheduling issue at the Ottawa Divisional Court the proposed date has been changed and the Tribunal is waiting to be notified of a new date. This case will be heard in the French language

9. Decisions Nos.832/04 (November 18, 2004) and 832/04R (April 5, 2007)

The worker left work due to back pain. Two weeks later the worker alleged the pain was due to an injury at work. The Board denied entitlement on the grounds it was not shown that an accident occurred in the course of employment.

The worker's appeal was denied. The Vice-Chair noted the worker's pre-existing back condition, and the absence of any medical support for the position that the back condition was caused by disablement from the nature of the work. The worker's alternative explanation that there was an accident involving carrying a ladder was not supported by the evidence.

The worker commenced an application for judicial review. The worker has filed an affidavit alleging that comments made by the Vice-Chair prior to the hearing constitute an apprehension of bias.

The Tribunal has served and filed its record, and both parties' factums have been served and filed. The judicial review will be heard in Ottawa. At the end of the quarter the Tribunal was waiting for a date to be set for the hearing of the judicial review.

10. Decisions Nos.1509/02 (February 2, 2004) and 1509/02R (September 27, 2006)

Two sisters were suspended at the same time for smoking in a non-smoking area at work. Sister #1 reported an accident within a few hours of returning after her suspension. Sister #2 reported an accident later that day, before the suspension took effect.

Sister #1's claim was denied by the Board. Her appeal to the Tribunal was dismissed (Decision 1384/03). She brought an application for judicial review. On April 6, 2005 the Divisional Court unanimously dismissed the application for judicial review. The Court stated "In our view, the Tribunal carefully reviewed the evidence and gave reasons for its decision. The decision it reached on the basis of the evidence was not patently unreasonable."

However, Sister #2's claim had been allowed by the Board. The employer appealed to the Tribunal. A Panel of the Tribunal allowed the employer's appeal, reversing initial entitlement for the worker (Decision 1509/02). Sister #2 commenced an application for judicial review in April 2004.

Following discussions with her former counsel, in November 2002 it was agreed that the judicial review application would be adjourned to allow the worker to pursue an application to reconsider Decision 1509/02.

In her reconsideration application the worker alleged the Panel had failed to consider that she had suffered a recurrence of a 1992 injury. Decision 1509/02R was released on September 27, 2006. In that decision the Tribunal found that although the worker had raised a cross-appeal in Decision 1509/02, the worker had not raised entitlement on the basis of a recurrence of the 1992 injury as an issue in that cross-appeal. Consequently, there was no error in Decision 1509/02 and the application for reconsideration was denied.

However, the Vice-Chair in Decision 1509/02R noted that it was still open to the worker to bring an appeal on the recurrence issue to the Tribunal, though it would be necessary to make an application to extend the time to appeal that issue.

The worker retained new counsel, and commenced an application to extend the time to appeal the Board decision. In Decision 2021/07E, the worker's application to extend the time to appeal the issue of recurrence in the June 4, 2001 ARO decision was denied.

The worker commenced an application to reconsider Decision 2021/07E. In Decision 2021/07ER, released July 22, 2009, the Tribunal allowed the reconsideration and granted an extension of time to appeal the recurrence aspect of the ARO Decision. The judicial review remains adjourned pending the further Tribunal decision on entitlement for the recurrence. The Tribunal hearing has been scheduled for October.

11. Decisions Nos.717/08 (April 30, 2008) and 717/08R (October 23, 2008)

The worker appealed to the Tribunal for an increase to his long term earnings basis from May 2000 to January 2003, and for a change to the Board's finding of a suitable employment or business (SEB) which had resulted in a reduction to his loss of earnings benefits. The Panel allowed the worker's appeal, directing the Board to recalculate the worker's long term average earnings from May 2000 to January 2003, finding the SEB was not appropriate, and that his loss of earnings benefits should be based on a higher hourly wage.

However, the worker requested a reconsideration of the Tribunal decision, alleging the calculation of his long term earnings should have been higher, the Panel should have made the actual calculations rather than referring this to the Board, his short term earnings should have been higher, and taking issue with some procedural rulings made by the Panel during his hearing.

In the reconsideration decision, the same Vice-Chair, sitting alone, denied the request for reconsideration. She found that the relevant law and policy had been applied to

determine the time periods on which the calculation of long-term earnings should be based. She found no error in referring the calculation of earnings to the Board. Further, the Tribunal had no jurisdiction to make findings on short term earnings because there was no final decision of the Board on that issue. She did not accept that the procedural allegations of the worker had any impact on the Panel's decision.

The worker attempted to file an appeal of the Tribunal's decision. Subsequently the worker retained counsel, who commenced an application for judicial review. The worker's counsel advised that she was revising the materials filed with the Court, but the application materials became muddled. The Ottawa Divisional Court had set a date for the judicial review to be heard on February 17, but after discussions it was agreed the judicial review would be adjourned on consent. Counsel for the worker failed to abide by a time-line to have the materials submitted by a specific date. At the end of the quarter the Tribunal was notified that the worker was now represented by new counsel.

12. Decisions Nos. 1248/98 (November 13, 2003), and 1248/98R (October 11, 2007)

The worker appealed for entitlement to benefits for his injuries to his head, eyes, spine, chest, and ribs that the worker related to an accident in March 1993. The worker also sought payment of temporary total disability benefits after June 25, 1993. The hearing took place over four days, starting in August 1998 and concluding in July 2003.

The Panel had concerns about the worker's credibility. The Panel did not accept the worker's version of the accident, or that he suffered the injuries he alleged were caused by the accident. The Panel also found that any injuries suffered by the worker had resolved by June 25, 1993.

The worker commenced an application for judicial review. He is self-represented. The Tribunal filed its Record of Proceedings. The worker refused to pay for the hearing transcripts he ordered, or to file a factum. As a result of telephone calls which the worker made to Tribunal staff, the Tribunal is not currently accepting further telephone calls from the worker.

The worker asked the Divisional Court for an extension of time in which to perfect his judicial review application. The Tribunal and the Tribunal's co-respondent took no position on the request. The Court granted the request and the worker had until the end of June 2009 to perfect the judicial review application. He failed to perfect in time. In March 2010 the worker served the Tribunal with a Notice of Abandonment.

The next day the Tribunal was advised by the Divisional Court Office that the worker had changed his name, and filed a new judicial review application. The new application was the same as the one he had just abandoned, except that the worker now identified himself under his new name.

The co-respondent has indicated that it will bring a motion to strike the new judicial review application. The Tribunal will be supporting that motion. As the worker has indicated he is not available until November, the motion will be heard in November.

13. Decisions Nos.1233/08 (June 9, 2008), 1233/08R (May 29, 2009) and 1233/08R2 (April 6, 2010)

The worker brought an appeal for initial entitlement for respiratory irritation from workplace exposure to paint odours. He was granted initial entitlement and loss of earnings benefits for a few weeks. His appeals for permanent impairment and for

psychological entitlement for stress were denied. The worker made a request for reconsideration which was denied.

The worker commenced an application for judicial review. The Tribunal filed its Record of Proceedings and the worker filed his factum.

The Tribunal then determined that it should reconsider its decisions on its own motion. The worker's counsel agreed to place the judicial review on hold pending the outcome of the Tribunal's reconsideration.

The Tribunal released its reconsideration decision, Decision 1233/08R2. That decision found that the worker had not been given a full opportunity at the Tribunal to make submissions on the duration of benefits. The Tribunal's decisions were varied to have the matter of the duration of benefits remitted to the Board, subject to the parties' usual appeal rights.

A decision of the Board then confirmed the same few weeks of benefits. The worker's lawyer wrote the Tribunal and suggested that he might revive the judicial review, but the Tribunal pointed out that that would be premature. It is expected that the worker will appeal the Board's decision. The judicial review is still on hold.

14. Decision No.1766/09 (September 29, 2009)

The worker was denied entitlement for chronic pain and LOE benefits after July 2001 by the Board. Her appeal to the Tribunal was granted, the Vice-Chair holding that the worker has entitlement to chronic pain, entitlement to partial wage loss benefits from April 2001 to June 27, 2002, and full LOE benefits from June 27 2004 to August 23, 2004. The Board was directed to determine if there was ongoing LOE entitlement after August 23, 2004.

The employer served an application for judicial review in December 2009. The Tribunal noted that the worker had not been named as a party in the application. Following discussions, the applicant's counsel took steps to add the worker as a party. The Tribunal then filed its Record. The employer filed its factum. At the end of the quarter it had been agreed that both the Tribunal and the worker would file their responding factums by July 30.

15. Decisions Nos.1110/07I (May 16, 2007), 1110/07 (September 12, 2008), and 1110/07R (March 10, 2009)

The worker appealed for entitlement for interstitial lung disease and for polymyocitis, which she alleged were conditions that resulted from her workplace exposure as a nurse. The Tribunal Vice-Chair sought the opinion of a Tribunal assessor, who was a respirologist with expertise in interstitial lung disease. The Vice-Chair reviewed the medical evidence and concluded that while an association with work was possible, on the balance of probabilities it was not likely that her condition arose from work and more likely it was idiopathic in origin.

The worker commenced an application for judicial review. The Tribunal served its Record of Proceedings. Over five months after the judicial review was commenced, the worker served the Tribunal with her Record and Factum. Given the delay in serving the Tribunal, the worker requested the Tribunal's consent to an order allowing an extension of time to file her Record and Factum with the Divisional Court. The Tribunal consented to the order. The Tribunal also agreed to file its factum within 30 days of the order. At the end of the quarter counsel for the worker was still amending his materials.

The worker included two new affidavits in her materials that were not part of the Tribunal's Record. The Tribunal has notified the worker that it intends to bring a motion to have the affidavits struck when the judicial review is heard.

16. Decisions Nos.1976/99I (November 30, 1999), 1976/99 (December 12, 2002), and 1976/99R (September 2, 2005)

The worker was granted entitlement on an aggravation basis for benefits from March 1991 until February 1992. The worker did not seek medical treatment from November 1991 until September 2004. The hearing Panel found the worker was suffering from regional myofascial pain, rather than fibromyalgia.

The Vice-Chair in the reconsideration decision held the hearing Panel may have been mistaken in making this determination, and also that this distinction in diagnosis was not sufficient to disqualify the worker from entitlement. However, he also held that even if the worker suffered from fibromyalgia, she would still not be entitled to benefits because it was not clear the worker suffered from a work injury, the medical reporting did not relate her condition to work, there was significant discrepancy in the medical reporting, and her allegation of significant worsening from 1991 to 1994 suggests another intervening cause of her disability.

The worker commenced an application for judicial review. However she was represented by a paralegal from Quebec, who would not have the status to represent her at Divisional Court. The Tribunal served its Record of Proceedings and is awaiting the worker's factum. In April the worker advised that she was seeking counsel to represent her. The Tribunal has also notified the worker of its concern with the lengthy delay in commencing this judicial review application.

17. Decisions Nos.1007/08 (May 9, 2008) and 1007/08R (October 20, 2008)

The worker, a police officer, was granted entitlement for a back and shoulder injury in 1975. In 1979 he suffered injuries to his chest, neck, upper back and left shoulder, for which he was granted a 10% permanent disability. He injured his back in 1986, for which he was granted two weeks of entitlement. In 1999 an ARO granted the worker entitlement for a stomach ulcer caused by his pain medication, but denied ongoing entitlement for his low back from the 1986 injury. In a 2003 ARO decision the worker was denied an increase to his 10% pension. In a 2006 ARO decision the worker was denied ongoing entitlement for his shoulder and neck from the 1975 accident, a permanent disability award arising from that accident, and also denied a pension assessment for his ulcer.

The worker appealed to the Tribunal for:

- ongoing entitlement and a pension assessment for the 1975 left shoulder and neck injury;
- entitlement for a stomach ulcer and stomach surgery from the 1979 injury,
- a pension award for neck and shoulder injury under the 1979 injury;
- an increase in the 10% pension award for his back and shoulder from the 1979 injury;
- a pension assessment for a back condition from the 1986 injury

The worker's appeals were denied. The Vice-Chair found that there was no on-going entitlement for a shoulder and neck injury, and no entitlement for a pension assessment

from the 1975 accident. The medical evidence indicated there were no on-going problems that were related to this accident.

Similarly there was no entitlement for the worker's stomach ulcer or stomach surgery from the 1979 accident because there was no ongoing disability related to his stomach. There was no entitlement for a pension for his neck and left shoulder because there was no objective evidence of an organic impairment. The 10% award for the thoracic spine and intrascapular left shoulder were appropriate as it reflected the worker's level of disability.

The Vice-Chair also held there was no ongoing entitlement for the 1986 accident, and hence no pension assessment was in order.

The worker's application for reconsideration was denied.

The worker commenced an application for judicial review. The worker is revising his materials to indicate the proper parties are named in the style of cause. Once this is completed the Tribunal will filed its Record. The respondent police department has indicated that it may participate as a co-respondent. The Tribunal has expressed its concern that it took the worker 17 months to commence the judicial review application.

18. Decisions Nos.774/09 (April 21, 2009) and 774/09R (August 20, 2009)

This was a section 31 application to determine whether the right of action of the plaintiffs was taken away under the Act. The plaintiff was the manager of an apartment building. His regular hours were 8 to 5, Monday to Friday, but he was on call outside of those hours. As a result of a flood in the parking garage, a plumber was called. The following day, while checking to see if the flooding problem was over, the plaintiff fell and injured himself.

Although the plaintiff at first claimed benefits from the Board, he subsequently decided to bring an action.

The Vice-Chair held the right of action was taken away. Although the plaintiff was not scheduled to be on duty at the time of the accident, he was a worker in the course of his employment when the accident occurred. He fell within the requirements for "time, place and activity" in Board policy. When he checked the flooding situation this was consistent with his workplace practices, which involved coming back on duty whenever there was a situation requiring him to perform his job duties.

The plaintiff commenced an application for judicial review. The Tribunal has filed its record and is currently awaiting the plaintiff's factum.

19. Decisions Nos.565/09 (December 8, 2009) and 565/09R (March 9, 2010)

In this right to sue case, a husband and wife shared driving duties in a transport truck. The wife was involved in a single vehicle accident. She and her husband were both injured, her husband sustaining severe injuries. Two insurance companies both brought section 31 applications for declarations that the husband and wife had their right to sue taken away under the Act. The husband had died by the time of the Tribunal hearing and his estate was a respondent. His wife was the other respondent.

The Vice-Chair found the right of action of both husband and wife was taken away, as they were both workers employed by a Schedule 1 employer and in the course of

employment at the time of the accident. The husband's application for reconsideration was denied.

The husband's estate commenced an application for judicial review of the Tribunal's decisions. The Tribunal and one insurance company are co-respondents. There is some uncertainty about whether the wife and the other insurance company will be parties in the judicial review. The Tribunal and the insurance company have filed responding factums. The judicial review will be heard in Sudbury in March 2011.

Other Legal Matters

20. Decisions Nos.610/05 (September 23, 2005) and 610/05R (June 8, 2006)

The worker appealed for entitlement for a cardiac condition which he claimed was caused by stress at work. After an exhaustive review of the facts, the Tribunal denied the worker's appeal. The Tribunal found the worker did not suffer from a heart attack at the relevant times, there were no acute emotional stress events caused by work, and the worker suffered from a large number of significant pre-existing risk factors that made and contribution from workplace stress an insignificant factor in his ongoing cardiac problems.

The worker commenced an application for judicial review, on which he represented himself. He alleged numerous errors and breaches of natural justice by the Panel. The judicial review was heard on February 9, 2009 before Justices Wilson, Reilly and Karakatsanis. The decision was released on February 20, and unanimously dismissed the judicial review. The Court found that contrary to the worker's allegation he was provided with the opportunity to make submissions, so there was no breach of natural justice. The Court also found that the Tribunal's factual findings were amply supported by the evidence, and its conclusions were reasonable.

The worker was not pleased with the Divisional Court's decision. He sent a considerable amount of correspondence to the Tribunal in which he attempted to reargue his appeal, and made allegations of misconduct against the Panel, the Tribunal Chair and General Counsel.

In April of 2010 the worker commenced a civil action against the Tribunal, also identifying the President of the Board and the Minister of Labour as "respondents". He also commenced a parallel action against the Board. The worker represented himself in these actions.

The Tribunal brought a motion to dismiss the action on the grounds that it was frivolous, vexatious and/or an abuse of process, or in the alternative that it disclosed no reasonable cause of action. The motion was heard on June 18 by Justice Richetti. His decision, dated June 22, dismissed both actions.

In regards to the action against the Tribunal, Justice Richetti found that there were not sufficient facts to support claims of bad faith, and the worker's action was an attempt to re-litigate the issues in his compensation claim. Justice Richetti held that in many cases the torts alleged made no sense or are improper, and the claim should be struck as failing to disclose an action.

Combined Values Chart and the Charter and Human Rights Code

Decision No. 1529/04 (June 30, 2010) is a second challenge under the *Canadian Charter of Rights and Freedoms* ("*Charter*") and the Ontario *Human Rights Code* ("*Code*") to the reduction of a worker's NEL award through the application of the Combined Value Chart ("CVC") of the *AMA Guides* (the "Guides"), as required by OPM Document No. 18-05-05 (the "Policy"). Like *Decision No. 1657/07*, *Decision No. 1529/04* found that there was no *Charter* or *Code* violation, although for somewhat different reasons.

The Panel noted that the Policy reflects the Board's decision on how to interpret and implement the Guides. The Guides clearly articulate that each person starts from a whole of 100% and cannot have an impairment of greater than 100%. The worker argued, however, that the Policy in requiring the application of the CVC was discriminatory because it applies to workers eligible for a NEL with a prior disability but not to those workers without a prior disability. The application of the CVC may result in a reduction, not an increase, of the NEL award.

With respect to the s.15 *Charter* analysis, the Panel found that there was no distinction based on an enumerated or analogous ground under the *Charter*. There was no evidence which showed that the principles behind the AMA Guides or CVC are discriminatory or inappropriate. The Panel rejected the argument that the Policy made a distinction upon an enumerated ground, namely, disability. Rather, the distinction was based on the defensible policy goal of assessing permanent impairments in accordance with the prescribed rating schedule. The Panel went on to consider the balance of the claim.

The Panel found there was no substantive discrimination and that the distinction in the Policy did not create a disadvantage by perpetuating prejudice or stereotyping. Among the Panel's findings, the Panel noted that it had not been demonstrated that the rating granted through the CVC did not accurately reflect the worker's level of impairment. Accordingly, the Panel found it had not been shown that there is a lack of correspondence between the impairment rating resulting from the application of the Policy and the claimant group's reality. Moreover, there was a lack of persuasive evidence to demonstrate that the AMA Guides and its underlying philosophy were flawed in their approach. The worker's NEL was reduced by applying the CVC on the basis that the NEL must be based on a whole person approach. In addition, the Panel noted that the worker did not establish that a fundamental interest had been affected by the Policy. The application of the CVC to reduce a worker's NEL award by a certain percentage amount did not preclude access to other benefits, such as loss of earnings benefits, labour market re-entry programs or health care.

On the *Code* claim, the Panel found that while the Policy distinguished based upon a prohibited ground under the *Code*, namely, workplace injury, there was no substantive discrimination. The Panel noted NEL awards were not reduced, however, for workers with non work-related disabilities. This was a *prima facie* case where the benefit payment created a distinction based upon a prohibited ground, namely, workplace injury. The Panel found, however, that the Policy did not amount to discrimination. It did not create a disadvantage by perpetuating prejudice or stereotyping. The Panel also found that the effect of the policy application corresponded to the actual needs and circumstances of the claimant group. Further, workers whose NEL is reduced are not restricted from access to loss of earnings, LMR or health care benefits. The Policy was consistent with WSIB jurisdiction over workplace injuries and consistent with the workplace insurance scheme as a whole. The appeal was denied.

Child Care Expenses and the Human Rights Code

In *Decision No. 991/09* (May 6, 2010), the worker sought payment of child care expenses under the *Workplace Safety Insurance Act* (WSIA). In May, 2006, the worker sustained a

compensable injury. She was granted entitlement to Loss of Earnings (LOE) benefits until October 2006.

The City in which the worker was employed administered an Ontario Works informal child care program. As an Ontario Works client, the worker selected licensed day care and then applied for a subsidy through the *Day Nurseries Act*. Entitlement to the subsidy was tied to the worker's employment status. After the worker's injury, however, as the worker was not attending work, the subsidy was cancelled. The worker sought the payment of child care expenses as a result, arguing that the denial of child care expenses was a breach of the *Human Rights Code* ("Code"). The worker argued that child care expenses were a benefit that should be included as part of her income

The Panel noted that neither WSIA nor Board policy explicitly provided for child care expenses as a benefit – the worker claimed benefits that simply do not exist and have not been contemplated under the WSIA. The Panel noted that not all losses suffered by injured workers give rise to entitlement to benefits under the Act and Board policy. Rather, the compensation scheme and WSIA legislative provisions provide for specific types of benefits. Child care expenses did not fall within the definition of earnings in s.2(1) of WSIA. The Panel noted that a broad interpretation of earnings, to include other forms of non-employment related compensation such as other social service benefits not specifically provided for under the Act, would be outside of what was contemplated by the WSIA. Also, it would be outside of the historic trade-off embodied in the compensation scheme. The Panel noted that s.53 describes average earnings as remuneration being received from an employer for whom the worker worked at the time of an injury; there are no references that child care expenses or some other non-employment related income, is considered as part of a worker's earnings or wages. In contrast, health care benefits and labour market re-entry costs are provided as there are explicit provisions in the legislation.

In considering the *Code* claim, the Panel noted that to find that there was a benefit which had been denied in a discriminatory manner, there must first be an obligation to provide such a benefit to the worker under the WSIA. There was, however, a deliberate exclusion of child care benefits from WSIA, and there was no language that could be described as potentially giving rise to such benefits.

Thus, there was no reasonable interpretation that allowed the granting of child care benefits under the WSIA. It followed that the denial of such benefits is not a violation of the *Human Rights Code*. The appeal was denied.

Kidney Disease and Exposure to Solvents

In *Decision No. 883/09* (June 15, 2010), the worker sought entitlement for Focal Glomerulosclerosis, a kidney disease, as being related to exposure to solvents from 1967 to 1971, while the worker was employed in a store fixtures business.

The Panel found that the worker worked as a carpenter for the employer. The employer was in the business of manufacture of store and hotel fixtures such as showcases, cabinetry, front desks and counters. After considering the evidence relating to exposure, the Panel obtained a medical report from a Tribunal assessor, who was a specialist in occupational medicine. The assessor's evidence indicated that the worker's exposure level was moderate to high, and that the worker's exposure was substantial enough to have caused or contributed to the worker's symptoms. Further, there was support in the literature that exposure to organic solvents may possibly cause glomerulonephritis, and may aggravate any such pre-existing condition, particularly in susceptible individuals. Also, the evidence indicated there was support for increased odds ratios for glomerulonephritis among heavily exposed workers. There was no other cause for the worker's kidney condition, other than solvent exposure.

In the circumstances, and on the balance of probabilities, the Panel found that the burden of the evidence, including the medical evidence, demonstrated that the worker's exposure to solvents in the workplace from 1967 to 1971 while he was employed as a carpenter for a store fixture business employer, caused or significantly contributed to his kidney disease. The appeal was allowed.

Squamous Cell Carcinoma

In *Decision No. 1875/09* (June 10, 2010) the worker sought entitlement for squamous cell carcinoma of the tongue related to the worker's job as a Truck Driver and to his exposure to various fuels. The worker was employed as a truck driver for 29 years and related his cancer to gasoline, benzene and various fuel exposures. The worker died on September 12, 2006. Survivor benefits were also sought.

After considering the evidence relating to exposure, the Panel obtained a report from a medical assessor who was a specialist in occupational medicine. While there was some evidence to support the worker's claim, the Panel found that the weight of the evidence, including the medical evidence, indicated that it was not likely on a balance of probabilities that the worker's exposure to various fuels, and the worker's job as a Truck Driver, contributed to the worker's squamous cell carcinoma of the tongue. The Panel concluded that the worker's squamous cell carcinoma of the tongue did not arise out of and in the course of employment. The Panel found that the benefit of the doubt did not apply in this case; the benefit of the doubt is only applied where the evidence for and against the appeal is of equal weight. In this case, the evidence for and against the appeal was not of equal weight. Rather, the evidence did not support entitlement for squamous cell carcinoma. Accordingly, the appeal was dismissed.

WSIAT
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